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A Progress Report
on the
IMPLEMENTATION OF THE STATE WATER CODE

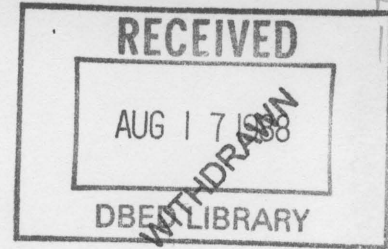


COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
State of Hawaii

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A Progress Report
on the

IMPLEMENTATION OF THE STATE WATER CODE,

COMMISSION ON WATER RESOURCE MANAGEMENT

WILLIAM W. PATY, Chairperson

JOHN LEWIN, M.D., Member

MICHAEL J. CHUN, Ph.D., Member

ROBERT S. NAKATA, Member

RICHARD H. COX, Member

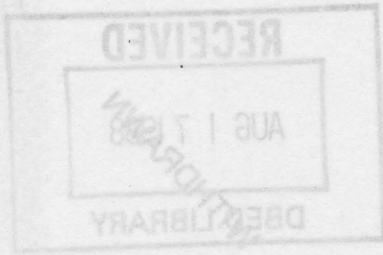
GUY FULMURA, Member

DEPARTMENT OF LAND AND NATURAL RESOURCES



COMMISSION ON WATER RESOURCE MANAGEMENT.
Department of Land and Natural Resources
-State of Hawaii

Honolulu, Hawaii
January 1988



JOHN WAIHEE
Governor

COMMISSION ON WATER RESOURCE MANAGEMENT

WILLIAM W. PATY, Chairperson

JOHN LEWIN, M.D., Member

MICHAEL J. CHUN, PhD., Member

ROBERT S. NAKATA, Member

RICHARD H. COX, Member

GUY FUJIMURA, Member

DEPARTMENT OF LAND AND NATURAL RESOURCES

WILLIAM W. PATY, Chairperson
Commission on Water Resource Management

MANABU TAGOMORI
Deputy for Water Resource Management

PREFACE

The State Water Code, Act 45, SLH 1987, was signed into law by Governor John Waihee on May 29, 1987. This Act placed the responsibility of statewide water management with the new Commission on Water Resource Management. This document is a report on the Commission's implementation efforts.

SUMMARY

The State Water Code, codified as Chapter 174C, HRS, was signed into law by the Governor on May 29, 1987 initiating the State's obligation to provide a water resources management program.

Nominating Committee

In connection with the establishment of the Commission on Water Resource Management, a nominating committee was formed on July 27, 1987, to evaluate applicants for four positions on the Commission. Nominating committee members were:

- Charlene Hoe, Executive Director of KEY Project
- Howard Tasaka, official with Sheetmetal Workers Union
- Allen Kajioka, architect
- Jann Yuen, attorney

Over 50 applications from interested, knowledgeable individuals in the water community were received.

Appointment of Commission Members

To complement the Chairperson of the Board of Land and Natural Resources and the Director of Health, both of whom will serve as ex-officio members, four additional water experts were appointed by Governor Waihee on October 22, 1987 to serve on the six-member Commission on Water Resource Management.

The members on the fully constituted Commission are:

- | | |
|-------------------------|--------------------------|
| • William Paty | Chairperson |
| • John Lewin, M.D. | Ex-officio Voting Member |
| • Michael J. Chun, PhD. | Member |
| • Robert S. Nakata | Member |
| • Richard H. Cox | Member |
| • Guy Fujimura | Member |

The four appointees are subject to Senate confirmation in 1988.

Appointment of the Deputy for Water Resource Management

On January 8, 1988, Governor John Waihee announced the appointment of Manabu Tagomori as Deputy for Water Resource Management.

Windward Oahu Interim Instream Flow Standards

On July 30, 1987, interim instream flow standards were established for Windward Oahu by the Board of Land and Natural Resources.

East Maui and Kauai Interim Instream Flow Standards

Interim instream flow standards for East Maui and Kauai, due by December 1987, were deferred by the Commission pending the adoption of the Code's administrative rules.

Promulgation of Administrative Rules

All chapters of the Code's Administrative Rules have been drafted and were submitted on December 28, 1987 to the Office of the Attorney General for review.

Appointment of Commission Members

To complement the Chairperson of the Board of Land and Natural Resources and the Director of Health, both of whom will serve as ex-officio members, four additional water experts were appointed by Governor Waihee on October 22, 1987 to serve on the six-member Commission on Water Resource Management.

The members on the fully constituted Commission are:

Chairperson	• William Pacy
Ex-officio Voting Member	• John Lewis, M.D.
Member	• Michael J. Chun, PhD.
Member	• Robert S. Nakata
Member	• Richard H. Cox
Member	• Guy Fujimura

The four appointees are subject to Senate confirmation in

1988.

Appointment of the Deputy for Water Resource Management

On January 8, 1988, Governor John Waihee announced the appointment of Mahana Tagomori as Deputy for Water Resource Management.

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Chapter I

ADMINISTRATION OF THE WATER CODE

The administration of the State Water Code rests with the Commission on Water Resource Management (CWRM). The Commission consists of six members, with the chairperson of the Board of Land and Natural Resources acting as the Commission chairperson and the Director of Health serving as an ex-officio voting member. The remaining four positions on the Commission are filled with appointees of the Governor. These four Commission members were chosen from a list of nominees submitted to the Governor by a nominating committee composed of four individuals.

Nominating Committee

The Code provides for a nominating committee of four persons to solicit applications and search for candidates for membership on the Commission. The Committee was composed of the following individuals, appointed in accordance with the Code:

Appointed by the Governor

- Charlene Hoe - Director of KEY Project in Kahaluu
- Howard Tasaka - Official with Sheet Metal Workers Union

Appointed by the President of the Senate:

- Allen Kajioka - Architect, Kajioka, Okada, and Partners.

Appointed by the Speaker of the House:

- Jann Yuen - Attorney with Grand Pacific Life.

The Nominating Committee, formed on July 27, 1987, began its search for candidates by placing news advertisements in local periodicals on July 26 and August 20, 1987 (see Appendix C).

Over 50 applicants were interviewed by the Nominating Committee. A list of 18 nominees was submitted to the Governor on September 28, 1987.

Commission on Water Resource Management

The four non-ex-officio members of the Commission were appointed by the Governor on October 22, 1987 and are subject to confirmation by the Senate in the legislative session of 1988. The following are the members of the Commission on Water Resource Management:

<u>Member</u>	<u>Term</u>	<u>Affiliation</u>
● William W. Paty	Ex-officio (Chairperson)	Chairperson of the Board of Land and Natural Resources
● John C. Lewin, M.D.	Ex-officio	Director of the Department of Health
● Michael J. Chun, PhD	4-years	VP and Secretary of Park Engineering
● Robert S. Nakata	4-years	Pastor of Kahaluu Methodist Church
● Richard H. Cox	2-years	Retired VP of Alexander & Baldwin, Inc.
● Guy Fujimura	2-years	Secretary-Treasurer of International Longshoremen & Warehousemen's Union

Deputy for Water Resource Management

Nine applicants were interviewed by the Nominating Committee for the position of Deputy for Water Resource Management. Based on the evaluations of the Nominating Committee, and with the approval of the other members, the Chairperson of the Commission appointed Mr. Manabu Tagomori to become the first Deputy for Water Resource Management. On January 8, 1988, Governor John Waihee formally announced the appointment of Mr. Tagomori.

A professional engineer registered in the State of Hawaii, Tagomori was the Manager-Chief Engineer of the Division of Water and Land Development, Department of Land and Natural Resources, prior to his appointment as Deputy for Water Resource Management. He will report to the Chairperson of the Commission, William Paty, and will administer and implement, under the direction of the Commission, the Code and its associated administrative rules.

Chapter II

PROMULGATION OF ADMINISTRATIVE RULES

Administrative rules drafted for the implementation of the State Water Code are currently under review by the Office of the Attorney General.

The order for adoption of administrative rules is as follows:

Administrative Rule 13-167	Practice and Procedure for the Commission on Water Resource Management.
" " 13-168	Reports on Water Use, Wells, and Stream Diversions.
" " 13-169	Protection of Instream Uses of Water.
" " 13-170	Hawaii Water Plan.
" " 13-171	Designation and Regulation of Water Management Areas.

A schedule of future Commission meetings for the review and adoption of administrative rules can be found in Appendix E.

Chapter III

ADOPTION OF INTERIM INSTREAM FLOW STANDARDS

The State Water Code provides for the protection of instream uses in Hawaii through the establishment of instream flow standards and the regulation of stream channel alterations. Pending the establishment of instream flow standards, the Code allows for the adoption of interim instream flow standards.

Interim standards are temporary flow standards of immediate applicability, adopted without the necessity of a public hearing and terminating upon the establishment of a permanent instream flow standard. An interim standard is somewhat general in nature, utilizes available data and can apply to an entire stream or drainage basin or possibly to all streams within a region.

Statutory Deadlines

Section 4 of the State Water Code provides specific deadlines for the adoption of interim instream flow standards throughout the State. Interim standards are to be adopted for the following regions by the dates indicated:

Windward Oahu	July 31, 1987
East Maui and Kauai	December 31, 1987
Hawaii and Molokai	July 1, 1988
West Maui and Leeward Oahu	December 31, 1988

Section 4 further states that the Commission may alter priorities relative to given areas and may extend the time needed for completion in the event contested case hearings or court appeals relative to establishing interim instream flow standards develop during this period.

Interim standards for Windward Oahu were adopted by the Board of Land and Natural Resources on July 30, 1987 under Chapter 176D, HRS. The Department of Land and Natural Resources then began work on interim standards for East Maui and Kauai streams, held four public meetings and two county agency briefings in October, and prepared a recommendation for the November 20, 1987 meeting of the Board of Land and Natural Resources.

Department staff had concluded that the Board could act on interim standards in the absence of an officially constituted Commission in order to comply with the statutory deadlines. However, on November 19, 1987, the Department was informed by the Office of the Attorney General that the Board's jurisdiction is specifically limited to the establishment of standards for Windward Oahu under Chapter 176D, HRS, and that the Commission, rather than the Board, must consider and provide decisions on interim standards for the remaining areas.

According to the Attorney General, the Commission could not legally consider nor adopt standards without first adopting administrative rules required to implement applicable sections of the Code. The adoption of administrative rules is anticipated to be final by mid-1988. Once the rules are adopted, the interim instream flow standards for East Maui and Kauai will be promptly considered.

While awaiting the adoption of administrative rules, the Department is continuing to work on developing interim standards for the remaining areas, with the intent of maintaining the schedule specified in the Code.

The chronology of events up to December 1987 is summarized in Appendix D.

Interim Standards for Windward Oahu Streams

Interim instream flow standards already adopted for Windward Oahu streams are based upon techniques for estimating streamflow required to maintain the habitat of particular species of native aquatic animals. The technique utilizes percentages of median streamflow to define the flow standard.

Initially, a full range of flows for the maintenance of aquatic habitat was considered and presented at public informational meetings as follows:

RANGE OF FLOWS TO MAINTAIN AQUATIC HABITAT

<u>Stream Condition</u>	<u>Desired Flow</u>
Flushing or Maximum	200% of the median flow
Optimum Range	60 - 100% of the median flow
Outstanding	50% of the median flow
Excellent	40% " " " "
Good	30% " " " "
Fair or Degrading	20% " " " "
Poor or Minimum	10% " " " "
Severe Degradation	less than 10% of median flow

Agency review of the proposed standards and public comments at informational meetings and at the Board meetings (July 10 & 30, 1987) indicated a number of concerns. The key concerns were:

- Mean streamflow rather than median should be used.
- If median flow is used, the standard should be set at 100% of the median flow.
- Calculated streamflows using the U.S. Geological Survey method for Windward Oahu streams vary widely from observed or actual flows.

Following its evaluation of agency input and testimony received at the public meetings, the Department selected the lower limit of the optimum range - 60% of the median flow - as the standard to be recommended to the Land Board. It was felt that this standard would ensure that aquatic species are protected and, at the same time, that existing and potential agricultural and other offstream uses of water are given appropriate consideration, as required by the State Water Code. In addition, the Division proposed a formula to estimate median flow on streams where flow records are not available.

In response to testimony received at its meetings, the Board adopted the following three-part standard on July 30, 1987:

- A. With respect to gaged streams, the standard is set at 100% of the median flow computed after existing diversions have been deducted.
- B. With respect to ungaged streams, no further diversion shall be allowed.

C. These interim instream flow standards can be modified on a case-by-case basis by individual application when additional and more specific data becomes available for each such individual stream.

Interim Standards for East Maui and Kauai Streams

The Department's proposed interim flow standard for East Maui and Kauai streams follows a format similar to the adopted standards for Windward Oahu.

In support of future applications of the flow standards, the U.S. Geological Survey was asked to develop appropriate formulas for the estimation of flows for ungaged streams in East Maui and Kauai. At this time, the Geological Survey formulas appear to be the best available means of estimating median flow on ungaged streams.

Two public informational meetings and a county agency briefing were held on both Maui and Kauai to provide the public an opportunity to review the proposed interim standards and provide their comments and recommendations.

Agency review and public comments received at these meetings expressed a number of different and opposing views. Different flow standards were suggested, including from the restoration to a pre-diversion natural flow; to the "status quo", and maintenance of varying flows such as 100%, 75%, 60%, and 30% of median flow. In addition, suggestions were made to provide standards for the more pristine streams, but allow the development of less pristine streams.

The Department considered all concerns expressed and subsequently drafted an interim standard for recommendation to the Board of Land and Natural Resources at its November 20, 1987 meeting (See Appendix B).

The recommended standard was as follows:

- A. A flow equal to 60% of the median streamflow derived from available actual flow records or estimated by the empirical formula:

$$Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$$

where: Q = median annual discharge (cfs)

A = drainage area (sq. miles)

R = mean annual precipitation (in.)

E = mean elevation (ft.)

C = swamp cover (percent)

Median streamflow was adjusted to exempt existing diversions and established water rights.

- B. A flow based on additional and more detailed data which, in the opinion of the Board, represents a better approximation of the water requirements of the identified instream values to be protected. These median streamflows are also adjusted to exempt existing diversions and established water rights.

As noted earlier, action on this proposed standard was deferred because the Board's jurisdiction on establishing standards is limited to Windward Oahu streams under Chapter 176D, HRS.

The Commission on Water Resource Management has since been provided copies of all comments received and it has asked the Department staff to explore another approach to resolve public and agency concerns.

The suggested new approach incorporates a priority system that would provide greater protection for pristine streams, and less protection for modified or diverted streams. Under this approach, pristine streams could be given a standard of 100% of the median streamflow or possibly a "status quo" standard, and modified and diverted streams could receive a lower standard, e.g. 30% of the median flow, allowing additional water to be developed for offstream use. Streams that fall between these two categories could be given a standard equal to 60% of the median streamflow. This approach would provide the Commission a wider opportunity to satisfy both environmental concerns and offstream user needs.

The application of this approach is considered to be significantly different from the initial proposal and, as such, a second round of public information meetings and agency briefings in the coming months is being scheduled. Following the meetings the Department will present its final recommendation to the Commission on Water Resource Management

Chapter IV

REORGANIZATION OF THE DIVISION OF WATER AND LAND DEVELOPMENT

The reorganization of the Department of Land and Natural Resources' Division of Water and Land Development, which is to technically support the Commission on Water Resource Management, is under review by the Administration. A major functional change is the transfer of the State's irrigation water development program to the Department of Agriculture. This transfer will be effective by June 1989 as mandated by Act 306, SLH 1987.

The Division is proposed to be renamed the Division of Water Resources and will be composed of four branches to reflect the major activities and areas under the State Water Code. The new branches would consist of the following:

- Survey Branch
- Regulation Branch
- Planning Branch
- Technical Services Branch

All of the present Division personnel, other than those in the irrigation services program, are expected to remain and be integrated into the new Division.

Additional specialty positions such as hydrologists, water resource planners, and environmental technicians are expected to be added to the technical staff necessary to implement the Code provisions.

Chapter V

FUTURE TASKS

The immediate goal of the Commission on Water Resource Management is to adopt administrative rules to allow the Commission to carry out its many functions. Once the rules are in place, and the Commission is officially established, focus will be placed on the following items in resource planning and management.

Resource Planning:

- (1) Prepare and implement the Hawaii Water Plan.

Resource Management:

- (1) Register existing water users and uses.
- (2) Inventory and record water use.
- (3) Survey stream systems for instream values.
- (4) Assess sustainable yield of resources in hydrologic units.
- (5) Establish interim instream flow standards statewide.
- (6) Establish permanent instream flow standards.
- (7) Regulate stream channel alterations.

A tentative schedule for discussions on these activity areas at future Commission meetings can be found in Appendix E.

APPENDIX A

CONFERENCE COMMITTEE REPORT NO. 119

Honolulu, Hawaii

April 27, 1987

RE: H.B. No. 35
H.D. 1
S.D. 2
C.D. 1

Honorable Daniel J. Kihano
Speaker, House of Representatives
Fourteenth State Legislature
Regular Session of 1987
State of Hawaii

Sir:

Your Committee on Conference on the disagreeing vote of the House of Representatives to the amendments proposed by the Senate in H.B. No. 35, H.D. 1, S.D. 2, entitled: "A BILL FOR AN ACT RELATING TO THE STATE WATER CODE", having met, and after full and free discussion, has agreed to recommend and does recommend to the respective Houses the final passage of this bill in an amended form.

The purpose of this bill is to regulate the water resources of the State of Hawaii for the benefit of its people.

Article XI, Section 7, of the Constitution of the State of Hawaii mandates the State's obligation "to protect, control and regulate the use of the Hawaii's water resources for the benefit of its people", and requires that:

"(t)he legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources."

Recognizing the magnitude and importance of this charge to the State by the 1978 Constitutional Convention, your Committee on Conference has resolved the differences in the two versions

of the Water Code. Your Committee wishes to express its deep appreciation to the late Richard A. Kawakami, Speaker of the House of Representatives of the Fourteenth Legislature, State of Hawaii, for his leadership and inspiration for final passage of this important legislation which will seek to preserve for the citizens of this State this most precious natural resource. Speaker Kawakami's gentle prodding brought this Water Code to resolution after nearly nine years of debate.

Both House and Senate versions of the Water Code are similar in concept. The House version (H.D. 1) and the Senate version (S.D. 2) are compared as follows:

HOUSE

Findings

Part

- I Administrative Structure
- II Reports on Water Use
- III Hawaii Water Plan
- IV Regulation of Water Use
- V Water Quality
- VI Instream Uses of Water
- VII Wells

Water Code Review Commission
No State Mandate
Repeal of Chapters 176, 176D,
177, and 178
Nomination Procedure for Water
Resources Board
Transition Provisions
Severability
Appropriation
Effective Date

SENATE

Findings

Part

- I Administrative Structure
- II Reports on Water Use
- III Regulation of Water Use
- IV Water Quality
- V Instream Uses of Water
- VI Wells
- VII Stream Diversion Works
- VIII Native Hawaiians Water Rights

Transfer Provisions
Water Code Review Commission
No State Mandate
Repeal of Chapters 176,
176D, 177, and 178
Appropriation
Effective Date and Transition
Provisions

The major differences between the two Houses have been resolved as follows:

- (1) The new six person, part-time, unpaid commission on water resource management is established in the Department of Land and Natural Resources. The

chairperson of the Board of Land and Natural Resources will be the chairperson of the Water Resources Commission. The Director of the Department of Health will serve as an ex officio voting member of the Commission. Four other members will be selected by the Governor from a slate recommended to the Governor by a selection commission and shall be subject to confirmation by the Senate.

- (2) A first deputy to the chairperson of the Commission is to be appointed by the chairperson with majority approval of the Commission. This deputy is to be someone other than any other first deputy to the chairperson as head of the board of land and natural resources. The Commission's first deputy shall be its chief executive officer.
- (3) The counties' powers to plan and zone shall not be affected by the Code. Rights to use of water resources cannot be acquired by prescription.
- (4) The Water Commission is charged with the administration of the Water Code with specific functions spelled out, including the establishment of an instream use protection program (part VI) and a permit system (part V). It is not the intent, however, to require an instream use permit for routine stream maintenance activities or for projects which have commenced construction.
- (5) A statewide dispute resolution mechanism is created in this Act to bring all water disputes before the Commission, rather than the courts, for expeditious and inexpensive resolution of conflicts both within and outside designated water management areas.

Your Committee believes that the Commission has the authority to and should adopt rules for the resolution of disputes which would include but not be limited to the inexpensive and timely determination of appurtenant rights, existing riparian uses, and existing correlative uses in disputes brought before the Commission; and the issuance of orders and rulings to protect the rights and uses of parties as

determined by the Commission. Both Houses agree that the final decision on these matters shall be made by the Commission. To the extent that the Commission believes further legislation in this area would be beneficial, the legislature would expect and welcome such proposals from the Administration.

(6) Any affected county agency may be admitted as a party to proceedings upon request.

(7) Reports of Water Use (part II) has been rewritten. A person shall declare and seek a certification of one's water use pursuant to Commission rules. The Commission is required to give notice of such rules by publication and by personal mailed notice to certain parties. The contents of the declarations are specified and if approved, the Commission shall issue a certificate describing the use. Hearings shall be held, if requested. Upon termination of a certified use, the certificate owner shall file a report with the Commission.

The section on certificates of use is intended to afford protection to constitutionally recognized interests under Article XII, Section 7 of Hawaii's Constitution that are not in designated areas. The Commission should adopt rules to provide adequate notice and procedural safeguards for all users including actual notice of applications to other users, that may be affected, hearing procedures, and conditions in a manner similar to that provided for permits in designated areas. Certificates of use shall be subject to appurtenant rights, existing riparian uses, and existing correlative uses.

(8) An entire new part III describing the Hawaii Water Plan is added. This is essentially the provisions contained in H.B. No. 35, H.D. 1.

(9) Water management areas may be designated under specific criteria, including situations where serious disputes are occurring or where increasing or proposed diversions of surface water may detrimentally affect existing instream uses or existing offstream uses.

- (10) The county shall notify the Commission within sixty days after receipt of notice of a permit request as to whether a proposed use is inconsistent with county land use plans and policies. In addition, requests for water in "an amount per month established by rule" may be made without modifying the permit. Existing uses of water in newly designated areas may continue until the Commission has acted on permit applications.
- (11) Appurtenant rights may not be lost. Riparian and correlative uses are protected in designated areas.
- (12) Jurisdiction over water quality has been expanded to also provide for exchange of information and for the formulation of a state water quality plan by the department of health.
- (13) The Commission is directed to implement instream flow standards when disposing of water from state watersheds and when regulating use of lands and waters within conservation districts.

To the fullest extent possible, it is the intent of the Legislature that interim instream flow standards be established prior to either new or expanded diversions of water from a stream. Protection of our streams is an important part of the water code.

It is your Committee's recommendation that the interim instream flow standards be undertaken by a joint Department of Land and Natural Resources, and appropriate federal agencies such as the U.S. Fish and Wildlife Service and U.S. Geological Survey, in order to take advantage of in-house, least-cost expertise.

- (14) Your Committee deleted the provision relating to the prohibition of the sale of water covered by permits and the ability of permittees to recover the costs of development and distribution of water. However, this deletion does not imply that the "sale" of water is affirmatively sanctioned by this Act; nor does this deletion imply that this Act curtails the ability of permittees to recover costs of developing and distributing water subject to the provisions of this Act.

- (15) In part IX on Native Hawaiian Rights, the cultivation or propagation of taro on one's own kuleana has been added to the enumeration of items considered traditional and customary.
- (16) The Commission is mandated to adopt interim instream flow standards for Windward Oahu by July 31, 1987, for East Maui and Kauai by December 31, 1987, for Hawaii and Molokai by July 1, 1988, and for West Maui and Leeward Oahu by December 31, 1988.
- (17) Other nonsubstantive changes were made throughout the Code for purposes of clarity.

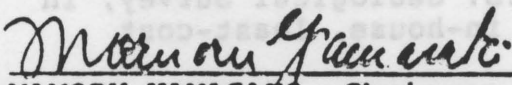
The provision transferring functions from the department of land and natural resources to the department of agriculture has been deleted because there is a separate bill which provides for managing irrigation water facilities.


The appropriation to the department of land and natural resources has been adjusted to provide for \$861,000 in fiscal year 1987-1988 and \$410,000 in fiscal year 1988-1989.

Your Committee on Conference is in accord with the intent and purpose of H.B. No. 35, H.D. 1, S.D. 2, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. No. 35, H.D. 1, S.D. 2, C.D. 1.

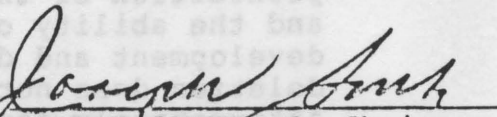
Respectfully submitted,

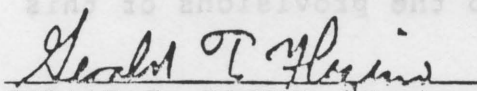
MANAGERS ON THE PART OF THE SENATE MANAGERS ON THE PART OF THE HOUSE

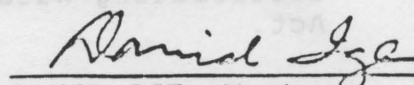

MAMORU YAMASAKI, Chairman


ANDREW LEVIN, Co-Chairman

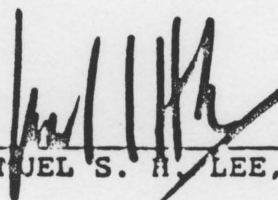

JAMES AKI, Member


JOSEPH SOUKI, Co-Chairman

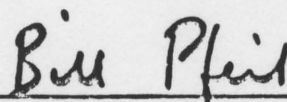

GERALD T. HAGINO, Member


DAVID IGE, Member


RICHARD M. MATSUURA, Member


SAMUEL S. H. LEE, Member


ANN KOBAYASHI, Member


BILL PFEIL, Member

ACT 45

H.B. NO. 35

A Bill for an Act Relating to the State Water Code.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings. The legislature finds that the water resources of the State of Hawaii are in need of management and regulation. During the past decades, there have been shortages of water and a decline in the ground water levels. Moreover, in recent years, some of Hawaii's waters have been severely polluted by a variety of toxic contaminants. Furthermore, there has been a great deal of uncertainty regarding the status of water rights. With these concerns in mind, the 1978 Constitutional Convention mandated the legislature to devise a statutory solution. Therefore, in acting pursuant to its obligations to implement Article XI, section 7, of the State Constitution, this legislature recognizes, as did the 1978 Constitutional Convention, that the State has an obligation to prevent any further harm by protecting, controlling, and regulating the use of Hawaii's water resources for the benefit of its people.

In enacting this legislation, the legislature acknowledges the farsighted contribution of the late Richard A. Kawakami, Speaker of the House of Representatives of the Fourteenth Legislature, State of Hawaii, who as Chairman of the House Water, Land Use, Development and Hawaiian Affairs Committee from 1971 through 1980 laid the foundation for a State Water Code. His visionary concern for the protection of Hawaii's water resources for all its people predated by many years, the 1978 Hawaii state constitutional convention's amendment to Article XI, section 7, of the Hawaii constitution and the final report of the Legislature's Advisory Study Commission on Water Resources submitted in January, 1985. The enactment of the State Water Code constitutes a legacy from the late Speaker which will benefit not only the citizenry of today but the countless generations yet to come. The legislature can find no greater or more precious monument to the memory of this wise and dedicated public servant than the passage of this Act.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER STATE WATER CODE

PART I. ADMINISTRATIVE STRUCTURE

§ -1 **Short title.** This chapter shall be known and may be cited as the State Water Code.

§ -2 **Declaration of policy.** (a) It is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use.

(b) There is a need for a program of comprehensive water resources planning to address the problems of supply and conservation of water. The state water use and protection plan, with such future amendments, supplements, and additions as may be necessary, is accepted as the guide for developing and implementing this policy.

(c) The State Water Code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.

(d) The State Water Code shall be liberally interpreted to protect and improve the quality of waters of the State and to provide that no substance be discharged into such waters without first receiving the necessary treatment or other corrective action. The people of Hawaii have a substantial interest in the prevention, abatement, and control of both new and existing water pollution and in the maintenance of high standards of water quality.

(e) The State Water Code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning.

§ -3 **Definitions.** As used in this chapter, unless the context otherwise requires:

"Authorized planned use" means the use or projected use of water by a development that has received the proper state land use designation and county development plan/community plan approvals.

"Board" means the board of land and natural resources.

"Chairperson" means the chairperson of the commission on water resource management.

"Change in use" means any modification or change in water use from or to domestic, municipal, military, agriculture (including agricultural processing), or industrial uses.

"Channel alteration" means: (1) to obstruct, diminish, destroy, modify, or relocate a stream channel; (2) to change the direction of flow of water in a stream channel; (3) to place any material or structures in a stream channel; and (4) to remove any material or structures from a stream channel.

"Commission" means the commission on water resource management.

"Continuous flowing water" means a sufficient flow of water that could provide for migration and movement of fish, and includes those reaches of streams which, in their natural state, normally go dry seasonally at the location of the proposed alteration.

"Department" means the department of land and natural resources.

"Domestic use" means any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation.

"Emergency" means the absence of a sufficient quantity and quality of water in any area whether designated or not which threatens the public health, safety, and welfare as determined by the commission.

"Ground water" means any water found beneath the surface of the earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise.

"Hydrologic unit" means a surface drainage area or a ground water basin or a combination of the two.

"Impoundment" means any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

"Instream flow standard" means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

"Instream use" means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

- (1) Maintenance of fish and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;

- (7) Maintenance of water quality;
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- (9) The protection of traditional and customary Hawaiian rights.

"Interim instream flow standard" means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

"Municipal use" means the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term "domestic use".

"Noninstream use" means the use of stream water that is diverted or removed from its stream channel and includes the use of stream water outside of the channel for domestic, agricultural, and industrial purposes.

"Nonregulated use" means any use of water which is exempted from regulation by the provisions of this code.

"Person" means any and all persons, natural or artificial, including an individual, firm, association, organization, partnership, business trust, corporation, company, the United States of America, the State of Hawaii, and all political subdivisions, municipalities, and public agencies thereof.

"Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.

"Stream" means any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted. The fact that some parts of the bed or channel have been dredged or improved does not prevent the watercourse from being a stream.

"Stream channel" means a natural or artificial watercourse with a definite bed and banks which periodically or continuously contains flowing water. The channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past.

"Stream diversion" means the act of removing water from a stream into a channel, pipeline, or other conduit.

"Stream reach" means a segment of a stream channel having a defined upstream and downstream point.

"Stream system" means the aggregate of water features comprising or associated with a stream, including the stream itself and its tributaries, headwaters, ponds, wetlands, and estuary.

"Surface water" means both contained surface water—that is, water upon the surface of the earth in bounds created naturally or artificially

including, but not limited to, streams, other watercourses, lakes, reservoirs, and coastal waters subject to state jurisdiction—and diffused surface water—that is, water occurring upon the surface of the ground other than in contained waterbodies. Water from natural springs is surface water when it exits from the spring onto the earth's surface.

“Sustainable yield” means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the commission.

“Time of withdrawal or diversion” means, in view of the nature, manner, and purposes of a reasonable and beneficial use of water, the most accurate method of describing the time when the water is withdrawn or diverted, including description in terms of hours, days, weeks, months, or physical, operational, or other conditions.

“Water” or “waters of the State” means any and all water on or beneath the surface of the ground, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground.

“Water management area” means a geographic area which has been designated pursuant to section -41 as requiring management of the ground or surface water resource, or both.

“Watercourse” means a stream and any canal, ditch, or other artificial watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted.

“Water source” means a place within or from which water is or may be developed, including but not limited to: (1) generally, an area such as a watershed defined by topographic boundaries, or a definitive ground water body; and (2) specifically, a particular stream, other surface water body, spring, tunnel, or well or related combination thereof.

“Well” means an artificial excavation or opening into the ground, or an artificial enlargement of a natural opening by which ground water is drawn or is or may be used or can be made to be usable to supply reasonable and beneficial uses within the State.

§ -4 Scope. (a) All waters of the State are subject to regulation under the provisions of this chapter unless specifically exempted. No provision of this chapter shall apply to coastal waters. Nothing in this chapter to the contrary shall restrict the planning or zoning power of any county under chapter 46.

(b) No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter, whether enacted or promulgated before or after the effective date of this chapter, inconsistent with the provisions of this chapter. Nothing in this chapter to the contrary shall restrict the power of any county to plan or zone as provided in chapter 46.

(c) No state or county government agency or other person having the power of eminent domain or condemnation under the laws of the State, may exercise the power with respect to condemning property if the condemnation will materially affect water resources in the State, without the written permission of the commission.

(d) No right, title, or interest in the use of any water resources of the State can be acquired by prescription.

§ -5 **General powers and duties.** The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

- (1) Shall carry out topographic surveys, research, and investigations into all aspects of water use and water quality.
- (2) Shall designate water management areas for regulation under this chapter where the commission, after the research and investigations mentioned in paragraph (1), shall consult with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water.
- (3) Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State.
- (4) May contract and cooperate with the various agencies of the federal government and with state and local administrative and governmental agencies or private persons.
- (5) May enter, after obtaining the consent of the property owner, at all reasonable times upon any property other than dwelling places for the purposes of conducting investigations and studies, or enforcing any of the provisions of this code, being liable, however, for actual damage done. If consent cannot be obtained, reasonable notice shall be given prior to entry.
- (6) Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purpose of utilizing and conserving the waters of the State, and assist such organizations and agencies in coordinating the use of their facilities and participate in the exchange of ideas, knowledge, and data with such organizations and agencies. For this purpose the commission shall maintain an advisory staff of experts.
- (7) Shall prepare, publish, and issue such printed pamphlets and bulletins as the commission deems necessary for the dissemination of information to the public concerning its activities.

- (8) May appoint and remove agents and employees including hearing officers, specialists, and consultants necessary to carry out the purposes of this chapter may be engaged by the commission without regard to the requirements of chapters 76 and 77 and section 78-1.
- (9) May acquire, lease, and dispose of such real and personal property as may be necessary in the performance of its functions, including the acquisition of real property for the purpose of conserving and protecting water and water related resources as provided in section -14.
- (10) Shall identify, by continuing study, those areas of the State where salt water intrusion is a threat to fresh water resources and report its findings to the appropriate county mayor and council and the public.
- (11) Shall provide such coordination, cooperation, or approval necessary to the effectuation of any plan or project of the federal government in connection with or concerning the waters of the State. The commission shall approve or disapprove such federal plans or projects on behalf of the State. No other agency or department of the State shall assume the duties delegated to the commission under this paragraph, except that the department of health shall continue to exercise such powers vested in it with respect to water quality, and except that the department of planning and economic development shall continue to carry out its duties and responsibilities under chapter 205A.
- (12) Plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water.
- (13) Shall catalog and maintain an inventory of all water uses and water resources.

§ -6 Deputy to the chairperson of the commission for water resource management. (a) There shall be a first deputy to the chairperson of the commission for water resource management ("deputy for water resource management") who shall be in addition to any other first deputy to the chairperson as the chairperson of the board of land and natural resources.¹ The deputy shall have experience in the area of water resources and shall be appointed by the chairperson with the approval of a majority of the commission.

(b) The duties of the deputy for water resource management shall be to administer and implement, under the direction of the commission, the state water code and all rules, and other directives promulgated in accordance therewith by the commission. Nothing in this provision shall be construed as limiting the authority of the commission as to matters regarding water resources.

(c) The position of deputy for water resource management is not subject to chapters 76 and 77.

(d) The salary of the deputy for water resource management shall be as provided in section 26-53 for first deputies or first assistants to the head of any department.

§ -7 Commission on water resource management. (a) There is established within the department a commission on water resource management consisting of six members which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as otherwise specifically provided in this chapter.

(b) Four members shall be appointed by the governor subject to confirmation by the senate, in a manner prescribed in subsection (d). Each member shall have substantial experience in the area of water resource management. The chairperson of the board of land and natural resources shall be the chairperson of the commission. The director of health shall serve as an ex-officio voting member.

(c) The members of the commission shall serve without compensation but shall be reimbursed for expenses, including travel expenses, necessary for the performance of their duties.

(d) In appointing a member to the commission, the governor shall select from a list submitted by a nominating committee. The nominating committee shall be composed of four individuals chosen as follows: two persons appointed by the governor; one person appointed by the president of the senate; and one person appointed by the speaker of the house. The committee shall solicit applications and send to the governor the names of at least three individuals for each open position.

(e) Except as otherwise provided in this chapter, the commission shall be subject to sections 26-34, 26-35, and 26-36.

§ -8 Adoption of rules concerning water resources by the commission. The commission shall adopt and enforce such rules as may be necessary or convenient to administer this chapter. The initial set of rules, subject to later amendment, revisions, or additions, shall be adopted no later than two years after the effective date of this chapter. Rules shall be adopted in conformity with chapter 91.

§ -9 Proceedings before the commission concerning water resources.

All proceedings before the commission concerning the enforcement or application of any provision of this chapter or any rule adopted pursuant thereto, or the issuance, modification, or revocation of any permit or license under this code by the commission, shall be conducted in accordance with chapter 91. Hearings regarding particular water resources shall be conducted on the island where those water resources are located.

§ -10 Dispute resolution. The commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this chapter. The final decision on any matter shall be made by the commission.

§ -11 Hearings officers. (a) The chairperson may appoint hearings officers, not subject to chapters 76 and 77, to hear and reach a preliminary decision on any matter concerning the implementation or administration of the state water code which the commission may refer to the hearings officers by rule or otherwise.

(b) In assigning matters to hearings officers, the chairperson shall make the assignments in a manner which ensures that hearings officers will develop familiarity and expertise with given geographic areas.

(c) In conducting a hearing on any matter referred by the commission, a hearings officer shall solicit and consider the views of the appropriate county officials responsible for planning, economic development, and resource management and such other county officials and others as the commission shall direct. Any affected county agency shall be admitted as a party upon request.

(d) Each hearings officer is deemed to be an agent of the commission with all powers associated with such designation.

(e) In order to facilitate dispute resolution, the commission may employ mediation methods where practicable including the use of masters.

(f) The commission shall adjudicate disputes where there is insufficient water to meet competing needs.

§ -12 Judicial review of rules and orders of the commission concerning the water code. Judicial review of rules and orders of the commission under this chapter shall be governed by chapter 91. Trial de novo is not allowed on review of commission actions under this chapter.

§ -13 Citizen complaints. The commission shall adopt, pursuant to chapter 91, procedural rules for the processing of citizen complaints including the right of appeal to the commission. If any person files a complaint with the commission that any other person is wasting or polluting water or is

making a diversion, withdrawal, impoundment, consumptive use of waters or any other activity occurring within or outside of a water management area, not expressly exempted under this code, without a permit where one is required, the commission shall cause an investigation to be made, take appropriate action, and notify the complainant thereof.

§ -14 Acquisition of real property. (a) The legislature declares it to be necessary for the public health and welfare that water and water related resources be conserved and protected. The acquisition of real property for this objective shall constitute a public purpose for which public funds may be expended.

(b) The commission may acquire real property and easements by purchase, gift, devise, lease, eminent domain, or otherwise for flood control, water management, or water and water-related resource conservation.

(c) Land, water areas, and related resources which may be acquired for this purpose include, but are not limited to, streams and other water-courses, parks and recreation areas, beaches, submerged lands, and other open areas, as well as necessary access sites and rights-of-way.

(d) This section does not limit the exercise of similar powers delegated by statute to any state or local government agency. This section is not intended to limit, in any way, the powers of the commission in regards to the acquisition of real property under any other statute.

§ -15 Penalties and common law remedies. (a) The commission may enforce its rules and orders adopted pursuant to this chapter by suit for injunction or for damages or both.

(b) Any person who violates any provision of this chapter may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000. For a continuing offense, each day during which the offense is committed is a separate violation.

(c) No provision of this chapter shall bar the right of any injured person to seek other legal or equitable relief against a violator of this chapter.

§ -16 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, this invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

PART II. REPORTS OF WATER USE

§ -26 Filing of declaration. (a) Any person making a use of water in any area of the State shall file a declaration of the person's use with the commission within one year from the effective date of rules adopted to implement this chapter.

(b) When the commission requires filing of declarations by rules, it shall cause notice of the rule to be given by publication in a newspaper of statewide circulation for filings in the city and county of Honolulu and by publication in a newspaper of areawide or countywide circulation and in a newspaper of statewide circulation for filings in counties other than the city and county of Honolulu. The commission shall also cause notice of the rules to be given by mail to any person required to file of whom the commission has or could readily obtain knowledge or who has requested mailed notice to be given when the commission adopts rules requiring the filing of declarations.

(c) The declarations shall be in such form and contain such information as the commission by rule prescribes, including the quantity of water used, the purpose or manner of the use, the time of taking the water, and the point of withdrawal or diversion of the water. Each declaration shall contain a statement, signed and sworn to by the person required to file the declaration, or by some other person duly authorized in the person's behalf, to the effect that the contents thereof are true to the best of the person's knowledge and belief.

(d) If no declaration is filed, the commission, in its discretion, may conclusively determine the extent of the uses required of declaration.

(e) The commission shall act upon a declaration within six months after its filing.

§ -27 **Issuance of certificate.** (a) When a declaration has been filed in accordance with this section and the commission has determined that the use declared is a reasonable, beneficial use, the commission shall issue a certificate describing the use. The certificate shall be deemed to constitute a description of the use declared. With respect to certificates for water use, the confirmed usage shall be recognized by the commission in resolving claims relating to existing water rights and uses including appurtenant rights, riparian and correlative use.

(b) The commission shall hold a hearing upon the request of any person adversely affected by the certification or the refusal to certify any water use.

(c) Whenever a certified use of water is terminated, the owner of the certificate shall file a report with the commission, providing all information prescribed in the rules of the commission.

PART III. HAWAII WATER PLAN

§ -31 **Hawaii water plan.** (a) The Hawaii water plan shall consist of four parts: (1) a water resource protection plan which shall be prepared by the water resources commission; (2) water use and development plans for each county which shall be prepared by each separate county and adopted by

ordinance, setting forth the allocation of water to land use in that county; (3) a state water project plan which shall be prepared by the agency which has jurisdiction over such projects in conjunction with other state agencies; and (4) a water quality plan which shall be prepared by the department of health.

(b) All water use and development plans shall be prepared in a manner consistent with the following conditions:

- (1) Each water use and development plan shall be consistent with the water resource protection and quality plan.
- (2) Each water use and development plan and the State water projects plan shall be consistent with the respective county land use plans and policies including general plan and zoning as determined by each respective county.
- (3) The water use and development plan for each county shall also be consistent with the state land use classification and policies.
- (4) The cost to develop the initial water use and development plan for each county shall be funded by the State in an amount not exceeding \$150,000 per county.
- (5) The cost of maintaining the water use and development plan shall be borne by the counties; state water capital improvement funds appropriated to the counties shall be deemed to satisfy Article VIII, section 5 of the State Constitution.
- (6) Each county in order to be eligible for state appropriations for county water projects must have developed an acceptable water use and development plan within the time frame established by this chapter.

(c) To prepare the water resources protection and quality plan, the commission shall: study and inventory the existing water resources of the State and the means and methods of conserving and augmenting such water resources; review existing and contemplated needs and uses of water including state and county land use plans and policies and study their effect on the environment, procreation of fish and wildlife, and water quality; study the quantity and quality of water needed for existing and contemplated uses, including irrigation, power development, geothermal power, and municipal uses; and study such other related matters as drainage, reclamation, flood hazards, floodplain zoning, dam safety, and selection of reservoir sites, as they relate to the protection, conservation, quantity, and quality of water.

The water resource protection plan shall include, but not be limited to:

- (1) Nature and occurrence of water resources in the State;
- (2) Hydrologic units and their characteristics, including the quantity and quality of available resource, requirements for beneficial

instream uses and environmental protection, desirable uses worthy of preservation by permit, and undesirable uses for which permits may be denied;

- (3) Existing and contemplated uses of water, as identified in the water use and development plans of the State and the counties, their impact on the resource, and their consistency with objectives and policies established in the water resource protection quality plan;
- (4) Programs to conserve, augment, and protect the water resource; and
- (5) Other elements necessary or desirable for inclusion in the plan.

Thereafter, the commission in coordination with the counties and the department of health shall formulate an integrated coordinated program for the protection, conservation, and management of the waters in each county based on the above studies. This program, with such amendments, supplements, and additions as may be necessary, shall be known as the water resource protection and quality plan.

Thereafter, each county shall prepare a water use and development plan and the appropriate state agency shall prepare the state water projects plan. Each county water use and development plan shall include but not be limited to:

- (1) Status of water and related land development including an inventory of existing water uses for domestic, municipal, and industrial users, agriculture, aquaculture, hydropower development, drainage, reuse, reclamation, recharge, and resulting problems and constraints;
- (2) Future land uses and related water needs; and
- (3) Regional plans for water developments including recommended and alternative plans, costs, adequacy of plans, and relationship to water resource protection and quality plan.

(d) The Hawaii water plan shall be directed toward the achievement of the following objectives:

- (1) The attainment of maximum reasonable-beneficial use of water for such purposes as those referred to in subsection (a);
- (2) The proper conservation and development of the waters of the State;
- (3) The control of the waters of the State for such public purposes as navigation, drainage, sanitation, and flood control;
- (4) The attainment of adequate water quality as expressed in the state water protection and quality plan; and
- (5) The implementation of the water resources policies expressed in section -2.

(e) The Hawaii water plan shall divide each county into sections which shall each conform as nearly as practicable to a hydrologic unit. The board shall describe and inventory:

- (1) All water resources and systems in each hydrologic unit;
- (2) All presently exercised uses;
- (3) The quantity of water not presently used within that hydrologic unit; and
- (4) Potential threats to water resources, both current and future.

(f) Within each hydrologic unit the commission shall establish the following:

- (1) An instream use and protection program for the surface water-courses in the area.
- (2) Sustainable yield. The sustainable yield shall be determined by the commission using the best information available and shall be reviewed periodically. Where appropriate the sustainable yield may be determined to reflect seasonal variation.

(g) The commission shall condition permits under part IV of this chapter in such a manner as to protect instream flows and maintain sustainable yields of groundwater established under this section.

(h) The commission shall give careful consideration to the requirements of public recreation, the protection of the environment, and the procreation of fish and wildlife. The commission may prohibit or restrict other future uses on certain designated streams which may be inconsistent with these objectives.

(i) The commission may designate certain uses in connection with a particular source of supply which, because of the nature of the activity or the amount of water required, would constitute an undesirable use for which the commission may deny a permit under the provisions of part IV.

(j) The commission may also designate certain uses in connection with a particular source of supply which, because of the nature of the activity or amount of water required, would result in an enhancement or improvement of the water resources of the area. Such uses shall be preferred over other uses in any action pursuant to sections -50(h) and -54.

(k) The commission may add to the Hawaii water plan any other information, directions, or objectives it feels necessary or desirable for the guidance of the counties in the administration and enforcement of this chapter.

(l) In formulating or revising the plans, each county and the commission shall consult with and carefully evaluate the recommendations of concerned federal, state, and county agencies.

(m) The commission shall not adopt, approve, or modify any portion of the Hawaii water plan which affects a county or any portion thereof without first holding a public hearing on the matter on the island on which the water resources are located. At least ninety days in advance of such hearing, the commission shall notify the affected county and shall give notice of such hearing by publication within the affected region and statewide.

Each county shall update and modify its water use and development plans as necessary to maintain consistency with its zoning and land use policies.

§ -32 Coordination. (a) Respective portions of the water resource protection and quality plan, and the water use and development plans of each county, shall be developed together to achieve maximum coordination.

(b) The development of the Hawaii water plan or any portion thereof shall proceed in coordination with and with attention to the Hawaii state plan described in chapter 226.

(c) The Hawaii water plan and its constituent parts, except for the water quality plan, shall be adopted by the commission not later than three years from the effective date of this chapter. The commission shall receive the water quality plan from the department of health and incorporate this part in the Hawaii water plan.

PART IV. REGULATION OF WATER USE

§ -41 Designation of water management area. (a) When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.

(b) The designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission. The chairperson, after consultation with the appropriate county mayor and county water board, shall act upon the petition by making a recommendation for or against the proposed designation to the commission within sixty days after receipt of the petition or such additional time as may be reasonably necessary to determine that there is factual data to warrant the proposed designation.

(c) Designated ground water areas established under chapter 177, the Ground Water Use Act, and remaining in effect at the effective date of this chapter shall continue as water management areas.

§ -42 Notice; public hearing required. When a recommendation for designation of a water management area has been accepted, the commission shall hold a public hearing at a location in the vicinity of the area proposed for designation and publish a notice of the hearing setting forth: a description of the land area proposed to be designated in terms of appropriate legal subdivisions and tax map keys; the purpose of the public hearing; and the time, date, and place of the public hearing where written or oral testimony may be submitted and heard. The notice shall be published once each week for three successive weeks in a countywide newspaper of general circulation in the appropriate county and the last publication shall be not less than ten days nor more than thirty days before the date set for the hearing. Publication of the notice of public hearing shall be considered as sufficient notice to all landowners and water users who might be affected by the proposed designation.

§ -43 Investigations required. Before any proposed water management area is designated by the commission, the chairperson may conduct, cooperate with the appropriate federal or county water agency in conducting, or administer contracts for the conduct of, any scientific investigation or study deemed necessary for the commission to make a decision to designate a water management area.

In connection with such investigation or study, the chairperson from time to time may require reports from water users as to the amount of water being withdrawn and as to the manner and extent of the beneficial use. Such reports shall be made on forms furnished by the department.

§ -44 Ground water criteria for designation. In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per cent of the sustainable yield of the proposed water management area;
- (2) There is an actual or threatened water quality degradation as determined by the department of health;
- (3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;
- (4) Whether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upcoming or encroachment of salt water;
- (5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;
- (6) Whether excessive preventable waste of water is occurring;

- (7) Serious disputes respecting the use of ground water resources are occurring; or
- (8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the commission, in one of the above conditions.

Notwithstanding an imminent designation of a water management area conditioned on a rise in the rate of ground water withdrawal to a level of ninety per cent of the area's sustainable yield, the commission, when such level reaches the eighty per cent level of the sustainable yield, may invite the participation of water users in the affected area to an informational hearing for the purposes of assessing the ground water situation and devising mitigative measures.

§ -45 Surface water criteria for designation. In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;
- (2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or
- (3) Serious disputes respecting the use of surface water resources are occurring.

§ -46 Findings of fact; decision of commission. After public hearing and any investigations deemed necessary have been completed, the chairperson, after consultation with the appropriate county council and county water board, shall make a recommendation to the commission for decision. If the commission decides to designate a water management area, it shall cause a notice of its decision to be published in a newspaper of general circulation in the appropriate county and when so published its decision shall be final unless judicially appealed.

§ -47 Modifying and rescinding designated areas. The modification of the boundaries or the rescinding of existing water management areas by the commission may be initiated by the chairperson or by a petition to the commission by any person with proper standing. The procedure for modifying the boundaries of an existing water management area or for rescinding an existing water management area shall be substantially similar to that for the designation of a water management area.

§ -48 Permits required. (a) No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission. However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water. An existing use in newly designated areas may be continued until such time as the commission has acted upon the application subject to compliance with section -51.

(b) In its regulation of water resources in designated water management areas, the commission shall delegate to the county boards of water supply the authority to allocate the use of water for municipal purposes, subject to the limits of water supply allocated to the county boards of water supply in their role as water purveyors.

§ -49 Conditions for a permit. (a) To obtain a permit pursuant to this part, the applicant shall establish that the proposed use of water:

- (1) Can be accommodated with the available water source;
- (2) Is a reasonable-beneficial use as defined in section -3;
- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;
- (5) Is consistent with state and county general plans and land use designations; and
- (6) Is consistent with county land use plans and policies.

(b) Within sixty days after receipt of a notice of a permit application, the county shall inform the commission if the proposed use is inconsistent with county land use plans and policies.

(c) The common law of the State to the contrary notwithstanding, the commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed from which it is taken if the commission determines that such transport and use are consistent with the public interest and the general plans and land use policies of the State and counties.

(d) The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided that all presently existing legal uses of water shall be protected.

§ -50 Existing uses. (a) All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of this chapter only with a permit issued in accordance with sections -51, -52, and -53(b).

(b) After publication as provided in section -52, the commission shall issue a permit for the continuation of a use in existence on the effective date of this chapter if the criteria in subsection (a) are met and the existing use is reasonable and beneficial.

Whether the existing use is a reasonable-beneficial use and is allowable under the common law of the State shall be determined by the commission after a hearing; provided that the commission may make such a determination without a hearing, if the quantity of water applied for does not exceed an amount per month established by rule or if the quantity of water applied for exceeds an amount per month established by rule, but no objection to the application is filed by any person having standing to file an objection. In determining whether an application does not exceed the amount per month established by rule, the commission shall consider an average of water use over the three-month period immediately preceding the filing of the application.

(c) An application for a permit to continue an existing use must be made within a period of one year from the effective date of designation. Except for appurtenant rights, failure to apply within this period creates a presumption of abandonment of the use, and the user, if the user desires to revive the use, must apply for a permit under section -51. If the commission determines that there is just cause for the failure to file, it may allow a late filing. However, the commission may not allow a late filing more than five years after the effective date of rules implementing this chapter. The commission shall send two notices, one of which shall be by registered mail, to existing users to file for an application for a permit to continue an existing use.

(d) An application shall be acted upon by the commission within ninety calendar days of an application not requiring a hearing, or within one hundred eighty calendar days of an application requiring a hearing. The time periods prescribed in this subsection shall not be deemed to run for any period in which an application is not complete in all material respects in the judgment of the board.

(e) The commission shall issue an interim permit; provided that the existing use meets the conditions of subsection (b). The commission shall also issue an interim permit for an estimated, initial allocation of water if the quantity of water consumed under the existing use is not immediately verifiable, but the existing use otherwise meets the conditions of subsection (b) for a permit or an interim permit. An interim permit is valid for such time period specified therein. The commission may issue successive interim permits of limited duration. Interim permits are subject to revocation under section -58. Whenever interim permits are to be issued, the time periods specified in subsection (d) apply to the issuance or nonissuance of interim permits.

(f) A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use. The quantity being consumed shall be determined and verified by the best available means not unduly burdensome on the applicant, as determined by the commission. The commission may prescribe the installation of metering or gauging devices, and, if so prescribed, such metering or gauging devices shall be in place and operational for at least one year before a determination is made as to the quantity of water being consumed in an existing use and a final permit is issued.

(g) If an interim permit is issued pending verification of the actual quantity of water being consumed under the existing use, a final determination of that quantity shall be made within five years of the filing of the application to continue the existing use. In the final determination, the commission may increase or reduce the amount initially granted the permittee.

(h) Two or more existing uses of water are deemed to be competing when they draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield or instream flow standards established pursuant to law for the area. If applications are made to continue existing uses which are competing and the uses otherwise meet the requirements of subsection (b), the commission shall hold a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use.

(i) A permit user of water with a continuous reduced water usage shall be given priority to reobtain its permitted level of water usage over any other application; provided that the use remains the same and is reasonable and beneficial and water is available.

§ -51 Application for a permit. All permit applications filed under this part shall contain the following:

(1) The name and address of the applicant and landowner; provided that:

(A) In the event the applicant is an association, organization, partnership, trust, corporation, or any other legal entity doing business in Hawaii, the address of its principal place of business shall be stated in the application; and

(B) In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit;

(2) The date of application;

(3) The water source of the water supply;

- (4) The quantity of water requested;
- (5) The use of the water and any limitations thereon;
- (6) The location of the use of water;
- (7) The location of the well or point of diversion; and
- (8) Such other relevant information that the commission may request from time to time.

The commission in its discretion may allow a person to apply for several related withdrawals in the same application for a water permit.

§ -52 Notice. (a) Upon receipt of the application, the commission shall cause a notice thereof to be published in a newspaper having general circulation within the affected area. The notice shall be published at least once a week for two consecutive weeks. In addition, the commission shall cause a copy of such notice to be sent to any person who has filed a written request for notification of any pending applications affecting a particular designated area and to the mayor and the water board of the affected county. This notification shall be sent by regular mail before the date of last publication. The commission shall also make available to the public, upon request, a monthly bulletin of all pending applications.

(b) The notice and the monthly bulletin shall contain the name and address of the applicant; the date of filing; the date set for a hearing, if any; the source of the water supply; the quantity of water applied for; the use to be made of the water and any limitations thereon; the place of the use; and the location of the well point or diversion.

(c) The notice shall state that written objections to the proposed permit may be filed with the commission by a specified date. The commission shall establish by rules the time limits within which objections must be filed. The commission, at its discretion, may request further information from either applicant or objectors, and a reasonable time shall be allowed for such responses. Each applicant shall be notified by the commission of the objections filed to an application.

§ -53 Permit issuance. (a) The commission shall determine, after a hearing, if required, whether the conditions set forth in section -49(a) have been established; provided that the commission may make such determination without a hearing if the quantity of water applied for does not exceed an average amount per month to be established by rule or if the quantity of water applied for exceeds an average amount per month to be established by rule, but no objection to the application is filed by any person having standing to file an objection.

(b) In acting upon any application, the commission need consider only those objections filed by a person who has some property interest in any land within the hydrologic unit from which the water sought by the applicant is to be drawn or who will be directly and immediately affected by the water

use proposed in the application. The commission shall adopt rules governing the filing of objections and the persons having standing to file objections.

(c) An application shall be acted upon within ninety calendar days of an application not requiring a hearing, or within one hundred eighty calendar days of an application requiring a hearing. The time periods prescribed in this section shall not be deemed to run for any period in which an application is not complete in all material respects, in the judgment of the commission.

(d) As a condition for the issuance of a permit the commission may require the permittee to install meters, gauges, or other appropriate measuring devices.

§ -54 **Competing applications.** If two or more applications which otherwise comply with section -49 are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest.

§ -55 **Duration of permits.** Each permit for water use in a designated water management area shall be valid until the designation of the water management area is rescinded, unless revoked as provided in section -58 or modified as provided in section -57.

§ -56 **Review of permits.** At least once every twenty years, the commission shall conduct a comprehensive study of all permits issued under this chapter to determine whether the conditions on such permits are being complied with. The commission shall prepare a formal report to the legislature which shall be available to the public.

§ -57 **Modification of permit terms.** (a) A permittee may seek modification of any term of a permit. A permittee who seeks to change the use of water subject to the permit, whether or not such change in use is of a material nature, or to change the place of use of the water or to use a greater quantity of water than allowed under the permit or to make any change in respect to the water which may have a material effect upon any person or upon the water resource, shall make application pursuant to section -51 in respect to such a change. Modification of one aspect or condition of a permit may be conditioned on the permittee's acceptance of changes in other aspects of the permit.

(b) All permit modification applications shall be treated as initial permit applications and be subject to sections -51 to -56; except that if the proposed modification involves an increase in the quantity of water not

exceeding an average amount per month to be established by rule, the commission, at its discretion, may approve the proposed modification without a hearing provided that the permittee establishes that:

- (1) A change in conditions has resulted in the water allowed under the permit becoming inadequate for the permittee's needs; or
 - (2) The proposed modification would result in a more efficient utilization of water than is possible under the existing permit.
- (c) County agencies are exempt from the requirements of this section except where the modification involves a change in the quantity of water to be used or where the new use would adversely affect the quality of the water or quantity of use of another permittee.

§ -58 Revocation of permits. After a hearing, the commission may suspend or revoke a permit for:

- (1) Any materially false statement in the application for the water permit, a modification of a permit term, or any materially false statement in any report or statement of fact required of the user pursuant to this part.
- (2) Any wilful violation of any condition of the permit.
- (3) Any violation of any provision of this chapter.
- (4) Partial or total nonuse, for reasons other than conservation, of the water allowed by the permit for a period of four continuous years or more. The commission may permanently revoke the permit as to the amount of water not in use unless the user can prove that the user's nonuse was due to extreme hardship caused by factors beyond the user's control. The commission and the permittee may enter into a written agreement that, for reasons satisfactory to the commission, any period of nonuse may not apply towards the four-year revocation period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section -62 shall not apply towards the four-year period of forfeiture.

The commission may cancel a permit, permanently and in whole, with the written consent of the permittee.

§ -59 Transfer of permit. A permit may be transferred, in whole or in part, from the permittee to another, if:

- (1) The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
- (2) The commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in section -57, is also invalid and constitutes a ground for revocation.

§ -60 Contested cases. Chapter 91 shall apply except where it conflicts with this chapter. In such a case, this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision.

§ -61 Fees. The commission shall promulgate a schedule of application and permit fees. The fees shall be used to defray the administrative costs of the permit systems established under this chapter. A public agency shall not be subject to the payment of any fees.

§ -62 Declaration of water shortage. (a) The commission shall formulate a plan for implementation during periods of water shortage. As a part of the plan, the commission shall adopt a reasonable system of permit classification according to source of water supply, method of extraction or diversion, use of water, or a combination thereof.

(b) The commission, by rule, may declare that a water shortage exists within all or part of an area when insufficient water is available to meet the requirements of the permit system or when conditions are such as to require a temporary reduction in total water use within the area to protect water resources from serious harm. The commission shall publish a set of criteria for determining when a water shortage exists.

(c) In accordance with the plan adopted under subsection (a), the commission may impose such restrictions on one or more classes of permits as may be necessary to protect the water resources of the area from serious harm and to restore them to their previous condition.

(d) A declaration of water shortage and any measures adopted pursuant thereto may be rescinded by rule by the commission.

(e) When a water shortage is declared, the commission shall cause a notice thereof to be published in a prominent place in a newspaper of general circulation throughout the area. The notice shall be published each day for the first week of the shortage and once a week thereafter until the declaration is rescinded. Publication of such notice shall serve as notice to all water users in the area of the condition of water shortage.

(f) The commission shall cause each permittee in the area to be notified by regular mail of any change in the conditions of the permittee's permit, any suspension thereof, or of any other restriction on the use of water for the duration of the water shortage.

(g) If an emergency condition arises due to a water shortage within any area, whether within or outside of a water management area, and if the commission finds that the restrictions imposed under subsection (c) are not sufficient to protect the public health, safety, or welfare, or the health of animals, fish, or aquatic life, or a public water supply, or recreational, municipal, agricultural, or other reasonable uses, the commission may issue orders reciting the existence of such an emergency and requiring that such

actions as the commission deems necessary to meet the emergency be taken, including but not limited to apportioning, rotating, limiting, or prohibiting the use of the water resources of the area. Any party to whom an emergency order is directed may challenge such an order but shall immediately comply with the order, pending disposition of the party's challenge. The commission shall give precedence to a hearing on such challenge over all other pending matters.

§ -63 **Appurtenant rights.** Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections -26 and -27 and -58 to -62.

PART V. WATER QUALITY

§ -66 **Jurisdiction over water quality.** The department of health shall exercise the powers and duties vested in it for the administration of the State's water quality control program as provided by law.

§ -67 **Exchange of information.** (a) The department of health shall submit to the commission such information as the commission shall require as prescribed in its rules, provided it does not jeopardize any pending or ongoing enforcement action.

(b) The commission shall submit to the department of health such information as the department shall require, for the performance of its water quality functions.

§ -68 **Water quality plan.** (a) The department of health shall formulate a state water quality plan for all existing and potential sources of drinking water and that plan shall become part of the Hawaii water plan described in part III. Requirements for the plan shall be governed by chapters 340E and 342. The state water quality plan shall include water quality criteria for the designation of ground water areas and surface water sources pursuant to section -44.

(b) The state water quality plan shall be periodically reviewed and revised by the department of health as needed.

(c) In formulating or revising the state water quality plan, the department of health shall consult with and carefully evaluate the recommendations of concerned federal, state, and local agencies, particularly county water supply agencies.

(d) The department of health may ban the importation into this State of any substances which the department reasonably believes may present a danger to the water quality of this State.

PART VI. INSTREAM USES OF WATER

§ -71 **Protection of instream uses.** The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

(1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State;

(A) The commission, on its own motion, may determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams;

(B) In acting upon the establishment of instream flow standards, the commission shall set forth in writing its conclusion that the public interest does or does not require, as is appropriate, an instream flow standard to be set for the stream, the reasons therefor, and the findings supporting the reasons;

(C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use;

(D) Establishment or modification of an instream flow standard shall be initiated by the commission by providing notice of its intention to set an instream flow standard in a newspaper of general circulation published in the vicinity of the stream in question, to the mayor of the appropriate county, and to persons who have previously requested such notice in writing;

(E) After giving notice of its intention to set an instream flow standard, the commission or other agencies in participation with the commission shall investigate the stream. During the process of this investigation, the commission shall consult with and consider the recommendations of the department of health, the United States Fish and Wildlife Service, the mayor of the county in which the stream is

located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. In formulating the proposed standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for non-instream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution;

(F) Before adoption of an instream flow standard or modification of an established instream flow standard, the commission shall give notice and hold a hearing on its proposed standard or modification;

(2) Establish interim instream flow standards;

(A) Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard;

(B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;

(C) A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission;

(D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses;

(E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;

- (F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;
- (3) Protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses;
 - (A) The commission shall require persons to obtain a permit from the commission prior to undertaking a stream channel alteration; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit;
 - (B) Projects which have commenced construction or projects reviewed and approved by the appropriate federal, state, or county agency prior to the effective date of this chapter shall not be affected by this part;
 - (C) The commission shall establish guidelines for processing and considering applications for stream channel alterations consistent with section -93;
 - (D) The commission shall require filing fees by users to accompany each application for stream channel alteration;
- (4) Establish an instream flow program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water. The commission shall conduct investigations and collect instream flow data including fishing, wildlife, aesthetic, recreational, water quality, and ecological information and basic streamflow characteristics necessary for determining instream flow requirements.

The commission shall implement its instream flow standards when disposing of water from state watersheds, including that removed by wells or tunnels where they may affect stream flow, and when regulating use of lands and waters within the state conservation district, including water development.

PART VII. WELLS

§ -81 **Definitions.** As used in this part, unless the context otherwise requires, the terms:

“Abandoned well” means any well that has been permanently discontinued. Any well shall be deemed abandoned which is in such a state of disrepair that continued use for the purpose of obtaining ground water is impractical.

"Installation of pumps and pumping equipment" means the procedure employed in the placement and preparation for operation of pumps and pumping equipment, including all construction involved in making entrance to the well, and establishing seals and repairs to existing installations.

"Pump installation contractor" means any person, firm, or corporation which is in the business of installing or repairing pumps and pumping equipment.

"Pumps and pumping equipment" means any equipment or materials utilized or intended for use in withdrawing or obtaining ground water. It includes seals, tanks, fittings, and controls.

"Repairs" means any change, replacement, or other alteration of any well, pump, or pumping equipment which requires a breaking or opening of the well seal.

"Well" shall be as defined in section -3.

"Well construction" means the producing of any well, including the construction, alteration, or repair thereof, but excluding the installation of pumps and pumping equipment.

"Well driller" means any person, firm, or corporation which constructs, alters, or repairs wells.

"Well seal" means an approved arrangement or device used to cap a well or to establish and maintain a junction between the casing or curbing of a well and the piping or equipment installed therein, the purpose or function of which is to prevent pollutants from entering the well at the other terminal.

§ -82 Powers and duties of the commission. In addition to its other powers and duties, the commission shall:

- (1) Require registration of all existing wells, as provided in section -83;
- (2) Require permits for well construction and for installation of pumps and pumping equipment as provided in section -84;
- (3) Require well completion reports, as provided in section -85;
- (4) Develop well construction and installation standards for pumps and pumping equipment, as provided in section -86; and
- (5) Adopt, modify, and enforce all rules and orders necessary to carry out this part.

§ -83 Registration of all existing wells. Any person owning or operating any well shall register the well with the commission. Registration shall be on the forms provided by the commission. The registration report shall include such information as prescribed by the commission, including the water use permit number; the location of the well; the diameter of the well; the maximum capacity of the well; the name of the well driller who

constructed the well; and the name of the pump installation contractor who installed the pump and pumping equipment.

The commission may deny the issuance of a water use permit under part IV, until such time as the applicant registers all wells which the applicant owns or operates.

§ -84 Permits for well construction and pump installation. (a) No well construction and no installation of pumps and pumping equipment shall commence without appropriate permit from the commission. An application for a permit for well construction shall be required for all areas of the State including water management areas and shall be made by the well driller who will construct the well. An application for a permit for installation of a pump and pumping equipment shall be made by the pump installation contractor who will install the pump and pumping equipment.

(b) Every application shall contain such data prescribed by the commission, including the applicant's name; the applicant's license number; the name and address of the person who will control and operate the well; in water management areas, the water use permit number; the location of the well; the proposed depth and method of well construction; the size and expected capacity of the well; and a description of the pump and pumping equipment to be installed.

(c) The commission may issue a permit only if the proposed construction complies with all applicable laws, rules, and standards. Before acting on any application, the commission shall cause the application to be reviewed by the department of health for compliance with their rules and standards concerning, among other things, the appropriateness of the well location.

(d) Every permit shall direct the well driller and pump installation contractor to file a well completion report, as provided in section -85. The permit shall be prominently displayed at the site of the well at all times until the well construction or the pump and pumping equipment installation is completed.

(e) The holder of a permit for well construction, with the approval of the commission, may change the location of the well before construction is completed. An application to change the location shall describe the location, the proposed depth and method of construction, and the size and expected capacity of the new well. It shall also describe the manner of sealing or plugging the incomplete and abandoned well. The commission shall cause all such applications to be reviewed by the department of health for compliance with their rules and standards concerning, among other things, the appropriateness of the location of the well. The commission may issue an amended permit if it determines that the proposed new well location will serve the same use as the original well and draw upon the same supply of water and will not be contrary to any applicable law, rule, order, or regula-

tion, and that the incomplete and abandoned well will be sealed or plugged in a manner to prevent waste of water and damage to the water supply and to protect the public from harm.

(f) Any applicant whose application is rejected may obtain a hearing before the commission by filing within thirty days of the mailing of the notice of rejection a written petition requesting such a hearing. The hearing shall be conducted pursuant to part I.

(g) The commission may suspend or revoke a permit, after notice and hearing, on any of the following grounds:

- (1) Material misstatement or misrepresentation in the application for a permit;
- (2) Failure to comply with the provisions set forth in the permit;
- (3) Wilful disregard or violation of any provision of this part or any rule adopted pursuant thereto; or
- (4) Material change of circumstances or conditions existing at the time the permit was issued.

§ -85 **Well completion report.** Within thirty days after the completion of the well, the well driller and pump installation contractor shall file with the commission a written report containing such information prescribed by the commission, including, as appropriate: the depth, thickness, and character of the different strata penetrated and the location of water-bearing strata; the date of completion of the well; the length, size, and weight of the casing and a description of the placement of the casing; the size of the drilled hole; where the well is sealed off; the type of seal; the number of cubic feet per second or gallons per minute of flow from the well; the pressure in pounds per square inch, if a flowing well, and the static water level and water temperature, if a nonflowing well; and a chemical analysis of a water sample drawn from the well.

§ -86 **Well construction and pump installation standards.** (a) The commission shall adopt minimum standards for the construction of wells and the installation of pumps and pumping equipment. The standards shall be such as to ensure the safe and sanitary maintenance and operation of wells, the prevention of waste, and the prevention of contamination of the waters. The minimum standards for well construction shall include the criteria for well location and the procedures for grouting, sealing, capping, and plugging wells. They shall also provide for the installation of devices to measure the amount of ground water being withdrawn from the wells. The minimum standards for the installation of pumps and pumping equipment shall include the required equipment characteristics and construction.

(b) If any well construction or pump installation standard is violated and as a consequence ground water is wasted or any well is contaminated, the commission, after giving notice of the defect to the owner of the land on

which the well is located and giving such owner a reasonable time to correct the defect, may itself correct the defect and charge the land owner for the cost of such correction. Such cost constitutes a lien on the land until paid. The lien may be foreclosed in any court of competent jurisdiction, and in such foreclosure suit, the court shall allow the commission reasonable attorney's fees.

§ -87 **Abandonment of wells.** When a well is abandoned, the owner shall fill and seal the well in a manner approved by the commission. Before abandonment, the owner shall file with the commission a report showing the owner's name and address; the water use permit number, if any; the name and address of the well driller who will be employed to perform the work required for abandonment; the reason for abandonment; a description of the work to be performed to effect the abandonment; and such other information as the board may require.

PART VIII. STREAM DIVERSION WORKS

§ -91 **Definition.** In this part:
"Stream diversion works" means any artificial or natural structure emplaced within the stream for the purpose of diverting stream water.

§ -92 **Registration of existing stream diversion works.** Any person owning or operating a stream diversion works within or outside of a water management area shall register such work with the commission. Registration shall be on the forms provided by the commission. Reporting requirements on the registration forms shall be reasonable.

§ -93 **Permits for construction or alteration.** No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission. The commission may impose such reasonable conditions as are necessary to assure that the construction or alteration of such stream diversion works will not be inconsistent with the general plan and land use policies of the State and the affected county. Nothing in this section shall be construed to be inconsistent with part IV.

A person proposing to construct or alter a stream diversion work shall apply to the commission for a permit authorizing such construction or alteration. The application shall contain the following:

- (1) Name and address of the applicant;
- (2) Name and address of the owner or owners of the land upon which the works are to be constructed and a legal description of such land;
- (3) Location of the work;
- (4) Engineering drawings showing the detailed plans of construction;

- (5) Detailed specifications of construction;
- (6) Name and address of the person who prepared the plans and specifications for construction;
- (7) Name and address of the person who will construct the proposed work;
- (8) General purpose of the proposed work; and
- (9) Such other information as the commission may require.

§ -94 **Completion report.** Within thirty days after the completion of construction or alteration of any stream diversion work, the permittee shall file a written statement of completion with the commission. The commission shall designate the form of such statement and such information as it shall require.

§ -95 **Abandonment.** Any owner of any stream diversion work wishing to abandon or remove such work shall first obtain a permit to do so from the commission.

PART IX. NATIVE HAWAIIAN WATER RIGHTS

§ -101 **Native Hawaiian water rights.** (a) Provisions of this chapter shall not be construed to amend or modify rights or entitlements to water as provided for by the Hawaiian Homes Commission Act, 1920, as amended, and by chapter 175, relating to the Molokai irrigation system.

(b) No provision of this chapter shall diminish or extinguish trust revenues derived from existing water licenses unless compensation is made.

(c) Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, 'opae, 'o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter."

SECTION 3. Section 26-15, Hawaii Revised Statutes, is amended to read as follows:

"§26-15 Department of land and natural resources. The department of land and natural resources shall be headed by an executive board to be known as the board of land and natural resources[.], except for matters relating to the state water code where the commission on water resource management shall have exclusive jurisdiction and final authority.

The board shall consist of six members, one from each land district and two at large. The appointment, tenure, and removal of the members and the filling of vacancies on the board shall be as provided in section 26-34. The governor shall appoint the chairperson of the board from among the members thereof.

The board may delegate to the chairperson such duties, powers, and authority, or so much thereof, as may be lawful or proper for the performance of the functions vested in the board.

The chairperson of the board shall serve in a full-time capacity. The chairperson shall, in that capacity, perform those duties, and exercise those powers and authority, or so much thereof, as may be delegated by the board.

The department shall manage and administer the public lands of the State [and the water resources] and minerals thereon, including the soil conservation function, the forests and forest reserves, aquatic life and wildlife resources, aquaculture programs, and state parks, including historic sites.

The functions and authority heretofore exercised by the commissioner and board of public lands (including the hydrography division and the bureau of conveyances), the Hawaii water authority, the commission on ground water resources, the Hawaii land development authority, the soil conservation committee, and the commission on historical sites and the function of managing the state parks and the function of promoting the conservation, development and utilization of forests, including the regulatory powers over the forest reserve, aquatic life and wild life resources of the State heretofore exercised by the board of commissioners of agriculture and forestry as heretofore constituted are transferred to the department of land and natural resources established by this chapter."

SECTION 4. The commission shall adopt interim instream flow standards as follows:

- (1) Windward Oahu by July 31, 1987;
- (2) East Maui and Kauai by December 31, 1987;
- (3) Hawaii and Molokai by July 1, 1988; and
- (4) West Maui and Leeward Oahu by December 31, 1988.

The commission may alter priorities relative to given areas, and may extend the time needed for completion in the event contested case hearings or court appeals, relative to establishing interim instream standards develop during this period.

SECTION 5. (a) There is established within the legislative reference bureau for administrative purposes a review commission on the state water code consisting of seven members appointed by the president of the senate and the speaker of the house of representatives. The review commission shall be directly accountable to the legislature. The review commission shall

perform a comprehensive review of the state water code and the development of recommendations for its improvement. The review shall include, but not be limited to, the following: (1) all water issues addressed in the state water code; (2) other water matters of fundamental importance which should be dealt with in a state water code, but which have not yet been incorporated, such as the identification and definition of public and private rights to waters, the institution of a comprehensive statewide permit system to regulate all types and uses of water, the integration of water quality and water quantity matters for a unified management of the resource by a single lead agency; and (3) the appropriate agencies of the state and county levels responsible for protecting, developing, and controlling water, their aims and objectives, the necessary powers to be conferred upon them, and their organizational support.

(b) The review commission shall begin its review work five years following the passage of a state water code by the legislature and shall complete its work within a period of two years, culminating in a report of its findings and recommendations to the legislature. The review commission shall cease to exist one year after the submittal of the report.

SECTION 6. No provision in this Act shall be considered to be a mandate under Article VIII, Section 5 of the State Constitution, for a political subdivision to undertake new programs or to increase the level of services under existing programs of that political subdivision.

SECTION 7. If any portion of this Act, or the application thereof to any person or circumstance is held to be invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 8. Chapters 176, 176D, 177, and 178, Hawaii Revised Statutes, are repealed two years from the effective date of this Act. In the event of conflict, this chapter, and rules established hereunder, shall prevail.

SECTION 9. There is appropriated out of the general revenues of the State of Hawaii the sum of \$861,000 or so much thereof as may be necessary for fiscal year 1987-1988, and \$410,000 or so much thereof as may be necessary for fiscal year 1988-1989, for the purposes of this Act. The sum appropriated shall be expended by the department of land and natural resources.

SECTION 10. This Act shall take effect on July 1, 1987. However, the board of land and natural resources shall prepare all the necessary regulation and organizational support to implement this Act upon its passage.

(Approved May 29, 1987.)

Note

1. So in original.

APPENDIX B

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Water and Land Development
Honolulu, Hawaii

November 20, 1987

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

W I T H D R A W N

Gentlemen:

Adoption of an Interim Instream Flow Standards for
East Maui Streams

The State Water Code provides for the protection of instream uses in the State of Hawaii through the establishment of instream flow standards and the regulation of stream channel alterations. The Code requires the establishment of interim instream flow standards for the following areas by the dates indicated:

Windward Oahu July 31, 1987
East Maui and Kauai December 31, 1987
Hawaii and Molokai July 1, 1988
West Maui and Leeward Oahu December 31, 1988

Interim standards for Windward Oahu were adopted by the Board on July 30, 1987. This submittal is for the adoption of interim standards for all East Maui streams.

An "instream flow standard" is defined as a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic and other beneficial instream uses.

An "interim instream flow standard" is a temporary standard of immediate applicability, adopted by the Commission on Water Resource Management (or the Board until the Commission is established), without the necessity of a public hearing and terminating upon the establishment of an instream flow standard.

While instream flow standards, often referred to as permanent standards, are tied directly to the specific water requirements of the instream uses present, interim standards may be more general and applicable to an entire stream or drainage basin or possibly to all streams within a region.

Two public information meetings and a county agency briefing were held on October 21-22, 1987 on the proposed interim standard for East Maui streams and rivers. The issues raised at the East Maui meetings are summarized in Exhibit A.

The Division of Water and Land Development is recommending that the following 2-part interim standard be adopted:

- A. A flow equal to 60 percent of the median streamflow derived from actual flow records where available or estimated through the empirical formula, $Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$, and adjusted to exempt existing diversions and established water rights.

Item D-1

Nov. 20, 1987

- B. A flow based on additional, more detailed data which in the opinion of the Board represents a better approximation of the water requirements of the identified instream values to be protected, and adjusted to exempt existing diversions and established water rights.

The median flow of a stream is that flow which occurs 50% of the time. In applying the flow standard, median flow at the point of a proposed diversion would be determined, using either existing flow records or the USGS-derived formula. The median flow would then be multiplied by 60%. The resulting product is the instream flow which must be maintained downstream of the proposed diversion at all times unless natural weather conditions reduce streamflow below the standard. Existing diversions or established water rights, if any, would remain unaffected.

The percentage of median flow to be maintained as an interim standard is based on techniques of estimating flow requirements for aquatic species. By providing a flow adequate to protect aquatic species, it is assumed that all other instream uses can be accommodated. Different percentages of flow produce different levels of habitat quality:

Desired Habitat 60 - 100% of median flow
Survival (Minimum) 30% of median flow

Maintenance of 60% of the median stream flow is expected to sustain desired habitat conditions for most aquatic species, yet allow for some diversions to occur in consideration of potential agricultural and other offstream uses of stream water as required by the Water Code. Exhibit B provides a description of the U.S. Geological Survey formula and summarizes the method that will be used to derive the standard.

Monitoring and enforcement of the standard would be accomplished by department staff during routine stream surveys and during periodic site visits.

RECOMMENDATION:

That the Board approve and thereby establish interim instream flow standards for East Maui streams as follows:

- A. A flow equal to 60 percent of the median streamflow derived from actual flow records where available or estimated through the empirical formula, $Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$, and adjusted to exempt existing diversions and established water rights.
- B. A flow based on additional, more detailed data which in the opinion of the Board represents a better approximation of the water requirements of the identified instream values to be protected, and adjusted to exempt existing diversions and established water rights.

Respectfully submitted,


MANABU TAGOMORI
Manager-Chief Engineer

Attach.

APPROVED FOR SUBMITTAL

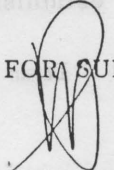

WILLIAM W. PATY, Chairperson

EXHIBIT A

Comments Received at Public Information Meetings on Interim Instream Flow Standards for East Maui Streams

Fifteen persons attended the Hana public meeting on October 21, 1987, and 41 persons attended the Kahului meeting the following evening. Six persons attended the agency briefing. In addition to interim standards, a number of related issues were raised, such as implementation of the new State Water Code, water rights, hydropower development, and the reissuance of the East Maui water licenses.

In reviewing the proposed range of flows to be adopted as interim standards, the consensus of public comment indicated a preference for 100% of the median flow, while some considered 60% to be an acceptable flow--one which would allow for new diversions. Some individuals suggested that no further diversions be allowed until more biological data are collected and permanent standards are established.

Use of the mean flow rather than the median flow in deriving estimates of streamflow was recommended by some individuals who noted that mainland methods use mean flow.

Some persons recommended setting interim standards on a stream-by-stream basis since there may be streams that do not need any instream flow standard, implying that there are some streams that have no instream uses to protect.

The Maui County Department of Water expressed that it wants to obtain the maximum amount of water for Maui consumers, citing its proposal to relocate and enlarge stream diversion intakes to improve the Upcountry water system. The Department stated that if it is required to leave water in the streams to comply with interim standards, then in times of low flow and drought, Upcountry residents and farmers will not have enough water. County agencies also suggested that the State, rather than the applicant, be required to conduct studies to provide the additional data required under Part B of the proposed standards.

Existing surface water users further stated that release of water to meet the standards will severely impact sugar company operations as well as Upcountry Maui users. These users urge the Department to insure that existing users are preserved and that the potential beneficial economic uses of stream water are not precluded.

However, the overriding concern of East Maui residents is the reissuance of water licenses for continued use of the existing East Maui ditch system which diverts a major portion of East Maui streamflow. Some individuals maintained that the State Water Code does not specifically exempt existing diverters from compliance with interim instream flow standards. These persons stated that even though a water license might require compliance, if interim standards exempt existing uses, and existing uses take all of the water in the stream, there will be no flow remaining to protect instream uses.

Community members requested and will be sent copies of this summary and the staff's recommendations to the Land Board.

EXHIBIT B

DERIVATION OF FLOW STANDARD FOR EAST MAUI STREAMS

$$\text{Interim IFS} = Q \times \text{Selected percentage factor}$$

Where ● IFS denotes instream flow standard.

- Q represents the actual median flow from gage records or the median flow computed using the formula shown below under Item 1.
- Percentage factor is that selected from the range of flows indicated under Item 2.

The standard would be applied so as to ensure that existing diversions and established water rights, if any, will remain unaffected.

1. Formula to Estimate Median Discharge

$$Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$$

where Q = median discharge (cubic feet per second)

A = drainage area (square miles)

R = mean annual precipitation (inches)

E = mean elevation (feet)

C = swamp cover (percent)

The above equation is based on the following assumptions:

- That the site at which the median discharge is to be estimated has long term perennial flow.
- That the drainage basin of the site has natural flow (no inflow, diversion, regulation, etc.).

2. Range of Flows to be Considered in Selecting Percentage Factor

Desirable Aquatic Habitat 60 - 100% of median flow

Survival Aquatic Habitat 30% of median flow

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Water and Land Development
Honolulu, Hawaii

November 20, 1987

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

W I T H D R A W N

Gentlemen:

Adoption of an Interim Instream Flow Standards for
Kauai Streams

The State Water Code provides for the protection of instream uses in the State of Hawaii through the establishment of instream flow standards and the regulation of stream channel alterations. The Code requires the establishment of interim instream flow standards for the following areas by the dates indicated:

Windward Oahu July 31, 1987
East Maui and Kauai December 31, 1987
Hawaii and Molokai July 1, 1988
West Maui and Leeward Oahu December 31, 1988

Interim standards for Windward Oahu were adopted by the Board on July 30, 1987. This submittal is for the adoption of interim standards for all streams and rivers on the island of Kauai.

An "instream flow standard" is defined as a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic and other beneficial instream uses.

An "interim instream flow standard" is a temporary standard of immediate applicability, adopted by the Commission on Water Resource Management (or the Board until the Commission is established), without the necessity of a public hearing and terminating upon the establishment of an instream flow standard.

While instream flow standards, often referred to as permanent standards, are tied directly to the specific water requirements of the instream uses present, interim standards may be more general and applicable to an entire stream or drainage basin or possibly to all streams within a region.

Two public information meetings and a county agency briefing were held on October 19-20, 1987 on the proposed interim standard for the Kauai streams and rivers. The issues raised at Kauai meetings are summarized in Exhibit A.

The Division of Water and Land Development is recommending that the following 2-part interim standard be adopted:

- A. A flow equal to 60 percent of the median streamflow derived from actual flow records where available or estimated through the empirical formula, $Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$, and adjusted to exempt existing diversions and established water rights.

November 20, 1987

- B. A flow based on additional, more detailed data which in the opinion of the Board represents a better approximation of the water requirements of the identified instream values to be protected, and adjusted to exempt existing diversions and established water rights.

The median flow of a stream is that flow which occurs 50% of the time. In applying the flow standard, median flow at the point of a proposed diversion would be determined, using either existing flow records or the USGS-derived formula. The median flow would then be multiplied by 60%. The resulting product is the instream flow which must be maintained downstream of the proposed diversion at all times unless natural weather conditions reduce streamflow below the standard. Existing diversions or established water rights, if any, would remain unaffected.

The percentage of median flow to be maintained as an interim standard is based on techniques of estimating flow requirements for aquatic species. By providing a flow adequate to protect aquatic species, it is assumed that all other instream uses can be accommodated. Different percentages of flow produce different levels of habitat quality:

Desired Habitat 60 - 100% of median flow
Survival (Minimum). 30% of median flow

Maintenance of 60% of the median stream flow is expected to sustain desired habitat conditions for most aquatic species, yet allow for some diversions to occur in consideration of potential agricultural and other offstream uses of stream water as required by the Water Code. Exhibit B provides a description of the U.S. Geological Survey formula and summarizes the method that will be used to derive the standard.

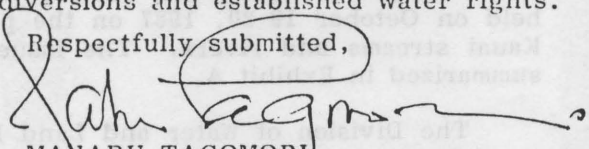
Monitoring and enforcement of the standard would be accomplished by DOWALD staff during routine stream surveys and during periodic site visits.

RECOMMENDATION:

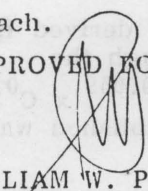
That the Board approve and thereby establish interim instream flow standards for streams and rivers on the island of Kauai as follows:

- A. A flow equal to 60 percent of the median streamflow derived from actual flow records where available or estimated through the empirical formula, $Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$, and adjusted to exempt existing diversions and established water rights.
- B. A flow based on additional, more detailed data which in the opinion of the Board represents a better approximation of the water requirements of the identified instream values to be protected, and adjusted to exempt existing diversions and established water rights.

Respectfully submitted,


MANABU TAGOMORI
Manager-Chief Engineer

Attach.


APPROVED FOR SUBMITTAL

WILLIAM W. PATY, Chairperson

EXHIBIT A

Comments Received at Public Information Meetings on Interim Instream Flow Standards for Kauai Streams

On October 19, 1987, 21 persons attended the Hanalei meeting and nine persons attended the Lihue meeting the following evening. Four persons attended the public agency briefing. In addition to interim standards, implementation of the new Water Code, water rights, and hydropower development were discussed.

Public comment and recommendations on interim standards ranged from requests for a moratorium on all diversions until permanent standards are established to setting the standard at 100%, 75%, and 60% of the median flow. Lower percentages were thought to provide greater opportunity for new diversions.

Use of the mean flow rather than the median flow was recommended by some individuals who noted that mainland methods used the mean flow.

Kauai community members also believe that Kauai and East Maui are different and thought that they might require different interim standards. In addition, they questioned the use of the same formula for estimating flow since they thought that Kauai and East Maui exhibit different climatology, geology, and hydrology.

Kauai community members expressed concern over "grandfathering" existing uses in that existing uses limit the use of streamflow by other smaller farmers and would effectively lower the instream flow standard since existing uses must be honored. On the other hand, existing surface water users clearly stated that they support the proposal to allow existing diversions to continue unaffected since any diminishment would endanger the survival of sugarcane production.

Wai'Ola, a Kauai river conservation organization, has proposed that a statewide study and inventory of river, stream and estuary resources be undertaken to identify those resources in need of protection by a river conservation program, and that water development be deferred until the foregoing inventory is completed. Wai'Ola asks that special consideration be given to the following Kauai streams: Waialae Stream, Lumahai River, Nualolo Aina Stream, Hanalei River, Hanakapiai Stream, Kalalau Stream, and Koaie Stream. Wai'Ola identified the following Maui streams for special consideration: Hanawi, Kahakuloa, Palikea (including Pipiwai and Oheo Gulch). Wai 'Ola has recommended that interim standards be set at 100% of the mean historically observable flow and on a stream-by-stream basis.

Finally, some individuals suggested that an instream flow standard for aquatic species may not be adequate for instream recreational uses.

Community members requested and will be sent copies of this summary and the staff's recommendations to the Land Board.

EXHIBIT B

DERIVATION OF FLOW STANDARD FOR KAUAI STREAMS

$$\text{Interim IFS} = Q \times \text{Selected percentage factor}$$

Where ● IFS denotes instream flow standard.

● Q represents the actual median flow from gage records or the median flow computed using the formula shown below under Item 1.

● Percentage factor is that selected from the range of flows indicated under Item 2.

The standard would be applied so as to ensure that existing diversions and established water rights, if any, will remain unaffected.

1. Formula to Estimate Median Discharge

$$Q = 1.466 \times A^{0.716} \times R^{1.711} \times E^{-0.959} \times C^{0.111}$$

where Q = median discharge (cubic feet per second)

A = drainage area (square miles)

R = mean annual precipitation (inches)

E = mean elevation (feet)

C = swamp cover (percent)

The above equation is based on the following assumptions:

- That the site at which the median discharge is to be estimated has long term perennial flow.
- That the drainage basin of the site has natural flow (no inflow, diversion, regulation, etc.).

2. Range of Flows to be Considered in Selecting Percentage Factor

Desirable Aquatic Habitat . . . 60 - 100% of median flow

Survival Aquatic Habitat . . . 30% of median flow

APPENDIX C

COMMISSION ON WATER RESOURCE MANAGEMENT

The Nominating Committee for the Commission on Water Resource Management is seeking applicants for:

—4 positions on the Commission on Water Resource Management

—First Deputy, for water resources, Department of Land and Natural Resources

Persons to be appointed to the Commission on Water Resource Management are required to have "substantial experience in the area of water resource management." This may include experience in the public sector at the county, state, or federal government levels; private sector experience; academic or research experience; or any other relevant experience.

The person to be appointed to the position of First Deputy, for water resources, Department of Land and Natural Resources, is to "have experience in the area of water resources" and will serve as deputy to the Chairperson of the Commission. Relevant experience may include experience in the public sector at the county, state, or federal government levels; private sector experience; academic or research experience; or any other relevant experience. The deadline for applications is August 14, 1987.

Applicants for either the positions on the Commission or the position of First Deputy are asked to submit a letter of application to the Nominating Committee and to provide in or with that letter, the applicant's name, address, and phone number where the applicant can be reached during working hours, and a description of the applicant's relevant experience. The deadline for applications is August 14, 1987.

Applications, and requests for further information regarding the responsibilities of the Commission should be mailed to:

Nominating Committee
Commission on Water Resource Management
c/o Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

(Hon. S.B. & Adv. July 26, 1987 (A-72988)
(Hon. Adv. Aug. 20, 1987 (A-73626)

APPENDIX D

CHRONOLOGY OF EVENTS

Upon the passage of the State Water Code, the immediate tasks before the Department of Land and Natural Resources were to develop an implementation plan for the Code, prepare for the establishment of the Commission on Water Resources Management, prepare administrative rules for the Code, expand the instream use protection program statewide, and set interim instream flow standards according to the schedule set out in the Code, and set the groundwork for the preparation of the Hawaii Water Plan.

A chronology of events follows:

<u>Date</u>	<u>Event</u>
April 30, 1987	Act 45, SLH 1987, is enacted by the Legislature.
May 29, 1987	Governor Waihee signs the State Water Code into law.
July 1, 1987	State Water Code becomes officially effective.
July 6 & 7, 1987	DLNR public information meetings for Windward Oahu interim instream flow standards.
July 27, 1987	Commission on Water Resource Management nominating committee formed.

<u>Date</u>	<u>Event</u>
July 30, 1987	Windward Oahu interim instream flow standards adopted by the Board of Land and Natural Resources.
September 28, 1987	List of Commission nominees submitted to Governor Waihee.
October 19-22, 1987	DLNR public information meetings and county briefings for Kauai and East Maui interim instream flow standards.
October 22, 1987	Governor Waihee appoints Commission members.
November 17, 1987	DLNR-county council briefings on the Hawaii Water Plan.
November 19, 1987	Action on interim instream flow standards for East Maui and Kauai deferred . Matter to be taken up by the new Commission upon adoption of administrative rules.
December 21, 1987	First official meeting of the Commission on Water Resource Management

APPENDIX E

SCHEDULE OF FUTURE COMMISSION MEETINGS

<u>Date</u>	<u>Topic</u>
1/13/88	Discussion on draft of Administrative Rule 13-167. Discuss and review Criteria and List of Prioritized Streams for East Maui and Kauai Interim Flow Standards.
1/20/88	Finalize revision to Administrative Rules 13-167 & 13-168. Distribute draft Administrative Rules 13-169, Protection of Instream Uses of Water, 13-170, Hawaii Water Plan, and 13-171, Regulation of Water Management Areas, to the Commission.
1/27/88	Finalize revisions to Chapters 169 and 170. Review and discuss Administrative Rule 13-171.
2/10/88	Finalize revision to Administrative Rule 13-171. Commission action required to approve submittal authorizing the holding of public hearings subject to the Governor's approval.

Date

Topic

2/17/88 Commission meeting to discuss and review proposal for interim instream standards for East Maui and Kauai. Briefing on Pearl Harbor Ground Water Control Area.

4/20/88 Commission action required to approve adoption of administrative rules and authorize submittal to Governor for final approval. (Note: if there are substantial changes to the rules, a second set of public hearings must be scheduled). Submit rules to Attorney General for final approval.

5/25/88 Commission meeting to approve interim instream flow standards for East Maui and Kauai. Briefing on Hawaii and Molokai concerns regarding interim instream flow standards.

6/15/88 Commission meeting to approve interim instream flow standards for Hawaii and Molokai.